Supreme Court, U.S.
FILED
MAR 9 1995
OFFICE OF THE CLERK

No. 94-560

In the Supreme Court of the United States

OCTOBER TERM, 1994

FIRST OPTIONS OF CHICAGO, INC., PETITIONER,

v.

MANUEL KAPLAN, CAROL KAPLAN & M.K. INVESTMENTS, INC., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY BRIEF FOR THE PETITIONER

STEPHEN P. BEDELL
TIMOTHY G. MCDERMOTT
Gardner, Carton & Douglas
321 North Clark Street
Chicago, Illinois 60610

KENNETH E. WILE
Bank of America National Trust & Savings Association
231 South LaSalle Street
Chicago, Illinois 60697

JAMES D. HOLZHAUER
Counsel of Record
TIMOTHY S. BISHOP
JEFFREY W. SARLES
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

I. BECAUSE RESPONDENTS SUBMITTED THE ARBITRABILITY ISSUE TO THE ARBITRATORS, DISTRICT COURT REVIEW IS DEFERENTIAL 1

A. Respondents clearly submitted the arbitrability issue to the arbitration panel. 2

B. Parties resisting arbitration have ample opportunity to secure judicial determinations of arbitrability. 3

C. The Third Circuit's decision undermines the federal policies served by the Arbitration Act. 10

II. UNDER ANY STANDARD OF REVIEW, THE ARBITRATORS' JURISDICTIONAL RULING SHOULD BE AFFIRMED 13

III. THE THIRD CIRCUIT EXERCISED DE NOVO APPELLATE REVIEW IN CONFLICT WITH THE PRO-ARBITRATION POLICY OF THE ACT 15

A. The Eleventh Circuit's hybrid standard of review conforms to the pro-arbitration policy of the Act. 17

TABLE OF CONTENTS—Continued

Page

B. If the court of appeals had applied ordinary standards of review, it would have affirmed the district court. 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases: *Page*

Allied-Bruce Terminix Cos. v. *Dobson*, No. 93-1001 (Jan. 18, 1995) 10, 11

AT&T Technologies, Inc. v. *Communications Workers of America*, 475 U.S. 643 (1986) 3

Boyte v. *Dickson*, 303 S.E.2d 418 (N.C. Ct. App. 1983), review denied and appeal dismissed, 307 S.E.2d 362 (N.C. 1983) 9

George Day Constr. Co. v. *United Bhd. of Carpenters and Joiners, Local 354*, 722 F.2d 1471 (9th Cir. 1984) 8

Insurance Corp. v. *Compagnie des Bauxites*, 456 U.S. 694 (1982) 3, 6

Jaffe v. *Nocera*, 493 A.2d 1003 (D.C. Ct. App. 1985) 9

Koonce v. *Quaker Safety Prods. & Mfg. Co.*, 798 F.2d 700 (5th Cir. 1986) 17

Massachusetts v. *United States*, 788 F. Supp. 1267 (D. Mass. 1992), aff'd, 984 F.2d 514 (1st Cir.), cert. denied, 114 S. Ct. 81 (1993) 18

Mastrobuono v. *Shearson Lehman Hutton, Inc.*, No. 94-18 (March 6, 1995) 14, 20

TABLE OF AUTHORITIES—Continued

Page

Mayes v. *Leipziger*, 729 F.2d 605 (9th Cir. 1984) 17

Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) . . . 5

Moses H. Cone Mem. Hosp. v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983) 7, 15

Oklahoma Tax Comm'n v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991) 19

Prima Paints Corp. v. *Flood & Conklin Mfg.*, 388 U.S. 395 (1967) 7

Rodriguez de Quijas v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989) 9

Societe Generale de Surveillance, S.A. v. *Raytheon European Mgt. & Sys. Co.*, 643 F.2d 863 (1st Cir. 1981) 5

United Indus. Workers v. *Virgin Islands*, 987 F.2d 162 (3d Cir. 1993) 9

United States v. *Guardino*, 972 F.2d 682 (6th Cir. 1992) 18

United Steelworkers v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960) 1, 3

TABLE OF AUTHORITIES—Continued

Page

Van Waters & Rogers, Inc. v. *International Bhd. of Teamsters, Local No. 70*, 913 F.2d 736 (9th Cir. 1990) 8

Statutes:

9 U.S.C. § 3 . . . . . *passim*

9 U.S.C. § 4 . . . . . *passim*

9 U.S.C. § 6 11

9 U.S.C. § 10 9

9 U.S.C. § 16 17

Miscellaneous:

134 Cong. Rec. S16,309 (Oct. 14, 1988) 5

H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924) . . . 6

S. Childress & M. Davis, *Federal Standards of Review* (2d ed. 1992) 17

I. MacNeil, R. Speidel & T. Stipanowich, *Federal Arbitration Law* (1994) 4, 5, 8, 16

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-560

FIRST OPTIONS OF CHICAGO, INC., PETITIONER,

v.

MANUEL KAPLAN, CAROL KAPLAN & M.K. INVESTMENTS, INC., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY BRIEF FOR THE PETITIONER

I. BECAUSE RESPONDENTS SUBMITTED THE ARBITRABILITY ISSUE TO THE ARBITRATORS, DISTRICT COURT REVIEW IS DEFERENTIAL

Respondents concede that an arbitrator's jurisdictional ruling is reviewed under a deferential standard if the parties have clearly and unmistakably "agree[d] to submit the jurisdictional issue to the arbitrator for conclusive determination." Resp. Br. 17 n.15; see *Warrior & Gulf*, 363 U.S. at

583 n.7.[1] Respondents acknowledge as well that they "filed a motion to dismiss for lack of jurisdiction" and a supporting memorandum of law with the Exchange's arbitration panel, requesting the panel to rule on their jurisdictional objections. Resp. Br. 7-8. None of respondents' efforts to avert the obvious conclusion—that because they asked the arbitration panel to decide the issue of arbitrability, they triggered the same deferential standard of judicial review that is applicable to arbitral decisions on other issues submitted to arbitration—can withstand scrutiny.

A. Respondents clearly submitted the arbitrability issue to the arbitration panel. The Kaplans assert that the parties did not clearly and unmistakably submit the issue of jurisdiction to the arbitrators. In an effort to suggest that they consistently denied the arbitration panel's authority to determine the jurisdictional issue, respondents repeatedly characterize their motion to dismiss as nothing more than an "objecti[on] to arbitrability" and "vigorous denial" of arbitral jurisdiction. Resp. Br. 17, 18; see also, *e.g.*, *id.* at 7-8. Respondents then urge this Court to distinguish between "objecting to arbitrability before the arbitrator" and "formal 'submission' [of the arbitrability] issue to binding arbitration," arguing that only in the latter case should the arbitrator's decision on arbitrability be accorded deference on judicial review. *Id.* at 17-18.

The underlying premise of respondents' argument—that they simply objected to jurisdiction but did not submit that issue to the arbitrators—is patently false. Respondents' motion to dismiss was not merely an objection to arbitral jurisdiction. To the contrary, the Kaplans fully briefed their jurisdictional objections and *asked* the panel to rule on that issue. Resp. Br. 7-8, 28; C.A. App. A194-A205. When the

[1] "Resp. Br." refers to the brief of Manuel Kaplan. "CK Br." refers to the brief of Carol Kaplan, which adopts Manuel Kaplan's arguments *in toto*. CK Br. 7.

panel, in response, determined that First Options' claims were arbitrable, the Kaplans fully participated in an eight day evidentiary hearing on the merits of First Options' claims and on the merits of the counterclaim filed by Manuel Kaplan that also invoked the panel's jurisdiction. Resp. Br. 28-29; Pet. App. A12. In those circumstances, the Kaplans clearly and unmistakably submitted arbitrability to the arbitrators for decision.

Respondents fail to identify any principled distinction between a *formal agreement* to submit arbitrability to the arbitrator—which they concede triggers deferential review—and the *actual submission* of arbitrability to the arbitrators. When the Kaplans asked the panel to rule on the grounds of jurisdiction over them that First Options had asserted (C.A. App. A194-A205), they defined arbitrability as one of "'the precise issues to be arbitrated'" as surely as if the parties had included that issue "in a submission agreement." Resp. Br. 17 & n.15. Cf. *Insurance Corp.* v. *Compagnie des Bauxites*, 456 U.S. 694, 706 (1982) ("By submitting to the jurisdiction of the court for the limited purpose of challenging jurisdiction, the defendant agrees to abide by that court's determination on the issue of jurisdiction"). The artificial distinction respondents advocate finds absolutely no support in this Court's precedents, which require only that agreement to arbitrate an issue be clear and unmistakable. See *AT&T Technologies*, 475 U.S. at 651; *Warrior & Gulf*, 363 U.S. at 583 n.7. Nor is it consistent with the design of the Federal Arbitration Act, which provides carefully structured opportunities to obtain judicial determination of arbitrability in the first instance.

B. Parties resisting arbitration have ample opportunity to secure judicial determinations of arbitrability. Amazingly, the Kaplans contend that the "common sense" response of a party "[un]willing to commit the jurisdictional question to the arbitrator for final decision" is to do just that: to present, brief and argue the jurisdictional point to the arbitration

panel. Resp. Br. 18. But the Arbitration Act and the body of law to which the Act was appended provide a coherent procedural scheme that enables a party resisting arbitration to have arbitrability determined in a judicial forum in the first instance; the Kaplans declined to make use of that procedure and instead asked for an arbitral ruling on jurisdiction. Having asked for and received an arbitral decision on arbitrability, the Kaplans would now remake the Act to give them yet another bite at the apple, inventing an entirely new method to obtain a *de novo* judicial determination of arbitrability.

A party resisting arbitration may refuse to arbitrate. That forces the other party to petition to compel arbitration under section 4 of the Act, or, if a judicial action has already begun, to petition under section 3 to stay that action pending arbitration. Respondents call it "Orwellian doublespeak" to suggest that defending against section 3 or 4 motions is a "procedural mechanism provided by the Act for parties objecting to arbitration." Resp. Br. 22. Leading commentators, however, recognize that this scheme provides a party that objects to arbitral jurisdiction with effective opportunities to obtain a judicial ruling on arbitrability in the first instance. 2 I. MacNeil, R. Speidel & T. Stipanowich, *Federal Arbitration Law* at 23:24 ("In both [section 3 and 4 proceedings], the party denying the obligation to arbitrate is a defender against the other party's motion or petition. Where the arbitration cannot go ahead without either the resisting party's cooperation or judicial intervention, *the opportunity to defend is generally all the judicial protection the resisting party needs*") (emphasis added).

Respondents maintain (Resp. Br. 14 n.13) that refusing to arbitrate was not an option for them because the Exchange's rules provide for a default award against a party that fails to appear. C.A. App. A296. But the Kaplans need not have awaited a default or the filing of a section 4 motion. They could instead have brought a declaratory or injunctive

action to stay the arbitration, thereby ensuring that a court would rule upon arbitrability in the first instance. Respondents do not deny that this course of action was available to them, or that they failed to seek a stay. Rather, they assert that nothing on the face of the Arbitration Act mandates that they should have taken "such extraordinary action." Resp. Br. 14; see *id.* at 21-22.

There can be no doubt, however, that a party's ability to seek a stay of arbitration and thereby obtain an initial judicial ruling on arbitrability is an integral and well-understood part of the Arbitration Act's architecture. "[T]o enjoin a party from arbitrating where an agreement to arbitrate is absent" is simply "the concomitant of the power to compel arbitration where it is present." *Societe Generale de Surveillance, S.A.* v. *Raytheon European Mgt. & Sys. Co.*, 643 F.2d 863, 868 (1st Cir. 1981) (Breyer, J.). The Act must be interpreted against the background of this "general judicial remed[y] for unjustified arbitral assertions of jurisdiction" (Resp. Br. 22 n.16), which derives from "the inherent equitable power of federal district courts to control their own docket." 2 I. MacNeil, R. Speidel & T. Stipanowich, *Federal Arbitration Law* at 23:26. Moreover, the Act itself confirms that stay-of-arbitration actions are a component of its goal of "guaranteeing the enforcement of private contractual arrangements." *Mitsubishi Motors*, 473 U.S. at 625. Section 16 of the Act, "by regulating appeals from decisions either enjoining or refusing to enjoin 'an arbitration that is subject to this title,'" explicitly "recognizes that such power exists apart from the [Act]." 2 *Federal Arbitration Law*, *supra*, at 23:26; see also 134 Cong. Rec. S16,309 (Oct. 14, 1988).[2]

---

[2] Respondents' argument also ignores the historical context of the Arbitration Act. At the time Congress was considering the Act, parties resisting arbitration had no difficulty finding courts hostile to arbitration and willing to interfere with arbitration proceedings

In the alternative, had respondents simply refused to arbitrate they would not have presented their jurisdictional objection for arbitral determination and thus would have preserved that issue for judicial decision in the first instance. If a default award had been entered against them, the Kaplans could have presented the arbitrability issue to the court on judicial review of the award. Cf. *Insurance Corp.*, 456 U.S. at 706 ("A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds * * *").

In any event, it is by no means certain that First Options would have pressed ahead to obtain a default award if the Kaplans had declined to participate in arbitration. Even

---

and to hear and decide contractual disputes even though they were subject to arbitration. Congress believed that the Act, coupled with the law already in place, provided both the parties seeking to enforce arbitration clauses and the parties claiming that disputes were not properly arbitrable the right to an advance determination of arbitrability:

> The bill declares simply that * * * agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement. The procedure is very simple * * * and at the same time safeguard[s] the rights of the parties. *There is provided a method for the summary trial of any claim that no arbitration agreement was ever made*, and there is also provided a hearing if the defeated party contends that the award was secured by fraud or other corruption or undue influence, or that some evident mistake not affecting the merits exists in the award. If the parties to the arbitration are willing to proceed under it, they need not resort to the courts at all. *If one party is recalcitrant he can no longer escape his agreement, but his rights are amply protected.*

H.R. Rep. No. 96, 68th Cong., 1st Sess. 1, 2 (1924) (emphases added).

where the arbitration agreement includes a default provision, a party faced with a recalcitrant opponent seeking to avoid arbitration may well file a section 4 motion to obtain an early decision on the proper forum for the dispute. The section 4 procedure is designed to be "as quic[k] and eas[y] as possible" and a party will often prefer to use that procedure rather than win a default award that may be of little value until its jurisdictional basis is tested on judicial review. *Moses H. Cone Mem. Hosp.*, 460 U.S. at 22.

Respondents took none of the options open to them to obtain a judicial determination of arbitrability, but instead presented the jurisdictional issue to the arbitration panel. They pretend that First Options somehow forced them to take this action by failing to "as[k] the federal district court to compel arbitration." Resp. Br. 19-20. This unexplained assertion is absurd. The section 4 "remedy for a party 'aggrieved by [a refusal to arbitrate]'" was unavailable to First Options because the Kaplans did not refuse to arbitrate. *Prima Paints*, 388 U.S. at 400. Far from it: respondents waived, at a discovery conference, the jurisdictional objections they had initially asserted (J.A. 55 ¶ 5), subsequently moved the arbitration panel to rule on arbitrability and, when they lost that motion, proceeded to arbitrate the merits. First Options had no reason to petition to compel arbitration and every reason to believe that the predicate for a section 4 petition had not been satisfied. Nor was section 3 of the Act implicated, because First Options had no need to stay any litigation pending an arbitration.[3]

---

[3] Respondents insinuate that First Options filed its arbitration claim "to gain a home-court advantage before a favorably predisposed" panel. Resp. Br. 20. But MKI and Manuel Kaplan were Philadelphia-based members of the Philadelphia Stock Exchange, and respondents point to no evidence whatsoever that the panel was predisposed to favor Chicago-based First Options. See Pet. App. A4-A5. Indeed, the panel originally included a business associate

Because First Options had no need to file a section 3 or 4 petition so long as the Kaplans were proceeding with the arbitration, this was a case in which the party wishing to avoid arbitration and to have a court decide arbitrability in the first instance should either have refused to arbitrate or have "take[n] the offensive" by filing an action to stay the arbitration. 2 I. MacNeil, R. Speidel & T. Stipanowich, *Federal Arbitration Law* at 23:24. The Kaplans did neither, but instead presented the arbitrability issue to the Exchange's arbitration panel for decision.[4] When a party chooses to

---

and friend of Manuel Kaplan's, Michael Waber, who was removed when First Options objected to his participation. C.A. App. A316, A569, A574. The district court firmly rejected respondents' claim of arbitral bias. Pet. App. C18-C26.

[4] Perhaps, as the Ninth Circuit holds, respondents could also have preserved arbitrability for *de novo* judicial review by expressly refusing to give that issue to the arbitrators. *George Day*, 722 F.2d at 1476; *Van Waters & Rogers, Inc.* v. *International Bhd. of Teamsters, Local No. 70*, 913 F.2d 736, 740 (9th Cir. 1990). The Kaplans did not do so—quite the opposite—so the Court need not decide whether that option exists (and petitioner certainly does not advocate or "suggest" its recognition). Respondents' head-scratching about "how * * * a party could keep an arbitrator [from] address[ing] jurisdictional objections" is misplaced (Resp. Br. 26), for *Van Waters* illustrates that a party may readily impose an express restriction on the scope of arbitration; an arbitrator's choice to ignore that restriction would not deprive the party of *de novo* review, because it did not agree to submit jurisdiction for arbitral determination. Respondents' second criticism of a rule allowing a party to preserve arbitrability for *de novo* review by refusing to give the question to the arbitrator—that "[i]t would require arbitrators to proceed blindly with arbitrations despite the existence of unexamined jurisdictional objections" (*id.* at 15)—has more substance and suggests that to obtain an initial judicial ruling on arbitrability a party should be required to follow the affirmative procedures discussed in text.

submit arbitrability to the arbitrator in this way, any subsequent judicial challenge to arbitral jurisdiction is narrowly constrained by section 10 of the Act. Section 10 requires extremely deferential review, permitting a court to overturn only those arbitral rulings that are in "manifest disregard of law." See Pet. Br. 20-23.

Respondents protest it would be "unfair" to apply section 10's manifest disregard standard to them—although they *asked* the arbitrators to rule on arbitrability—because "settled" Third Circuit law did not mandate that they seek a stay or refuse to arbitrate to preserve their jurisdictional argument for *de novo* review. Resp. Br. 28-29. But Third Circuit law did recognize that "[i]f the parties submit the issue of arbitrability to the arbitrator" a court must give the arbitrability decision "the same deference due an arbitrator's decision on the merits." *United Indus. Workers*, 987 F.2d at 167. Moreover, the rule we advocate is hardly "new," but flows from this Court's precedents and has been followed in other circuits. Pet. Br. 14-16, 27-30. In any event, the "general rule" that "the law announced in the Court's decision controls the case at bar" is particularly appropriate in cases that enforce arbitration agreements and thereby "furthe[r] the purposes and effect of the Arbitration Act." *Rodriguez de Quijas*, 490 U.S. at 485.[5]

---

[5] Respondents' *amicus* suggests, without citing authority, that *de novo* review of arbitrability decisions submitted to arbitrators for decision would harmonize federal law with the Uniform Arbitration Act in force in many states. SIA Am. Br. 9. In fact, state courts have routinely held that, in those circumstances, the Uniform Act does not permit *de novo* review of the jurisdictional issue and that a party objecting to arbitrability must seek a stay. *E.g.*, *Boyte* v. *Dickson*, 303 S.E.2d 418, 420-421 (N.C. Ct. App. 1983); *Jaffe* v. *Nocera*, 493 A.2d 1003, 1010 n.9 (D.C. Ct. App. 1985) (listing Uniform Act cases holding "that a failure to raise the issue of arbitrability by way of an application for stay of arbitration together with participation in the arbitration proceedings will

C. The Third Circuit's decision undermines the federal policies served by the Arbitration Act. Earlier this Term, in *Allied-Bruce Terminix Cos.* v. *Dobson*, No. 93-1001, slip. op. at 4 (Jan. 18, 1995), this Court reaffirmed the strong federal policy favoring enforcement of agreements to arbitrate. That policy is best served by the procedures contemplated in the Arbitration Act. On the one hand, a party opposing arbitration and desiring to obtain a judicial ruling on arbitrability in the first instance may bring an independent action for injunctive or declaratory relief; alternatively, it may refuse to arbitrate, then either defend against a section 3 or section 4 motion or, if a default is entered, seek *de novo* judicial review of arbitral jurisdiction. On the other hand, a party may choose to take advantage of the efficiency and economy of arbitration by presenting the issue of arbitrability to the arbitrator for decision in the first instance, as respondents did here. In that case, the arbitrator's rulings on jurisdiction and the merits are both reviewed under the deferential "manifest disregard" standard, in accordance with section 10. As we explained in our opening brief (Pet. Br. 23-27), this scheme promotes the speed and finality of arbitration and conserves the resources of parties, arbitrators, and federal courts alike by avoiding *de novo* relitigation of issues voluntarily submitted to arbitral decision.

Respondents' efforts to cast doubt on the practical benefits of denying *de novo* review in their situation are uniformly unsuccessful. We agree with respondents (Resp. Br. 23) that a lack of meaningful judicial review of arbitrability would be a disincentive to enter into arbitration agreements. But it is indisputable that in defending section 3 or 4 motions or seeking a stay of arbitration a party has every opportunity to have a court rule upon arbitrability in the first

---

waive the arbitrability issue and foreclose a party from raising it in a petition to vacate the award").

instance. And when parties instead agree to submit arbitrability to the arbitrator, a court will upset an arbitral ruling on jurisdiction if it is manifestly irrational. See CK Br. 9. No more is necessary to encourage arbitration agreements.

Nor is it inefficient to require a party to obtain any *de novo* judicial resolution of arbitrability prior to the arbitration proceeding, as respondents imagine. Resp. Br. at 23-26. An early and quick judicial determination as to the proper forum for a dispute—fostered by the simplified procedure provided for in section 6 of the Act—maximizes efficiency. If the objector prevails, the parties and arbitrators are saved the time and expense of conducting an arbitration. If the objector loses, the court's ruling provides substantial certainty that the arbitration will be binding.

The short delay that results from seeking an initial judicial determination of arbitrability (see Resp. Br. 25) pales in comparison to the waste involved in allowing a party to litigate jurisdiction twice, once before the arbitrator and then again before the court. Moreover, in order to take advantage of the greater speed, economy, and informality of the arbitral process, parties will often agree to present the jurisdictional issue to the arbitrator rather than seek a judicial ruling—as respondents did here and as parties typically have done in those circuits that already recognize the rule that the Third Circuit rejected. Pet. Br. 27-30. A party should not be permitted to renege on that decision by seeking *de novo* judicial review if it does not like the result of the arbitration. Respondents identify no reason why they should get two bites at the apple in that way. See *Allied-Bruce Terminix*, slip. op. at 12 (rejecting an interpretation of the Act "that risks the very kind of costs and delay through litigation * * * that Congress wrote the Act to help the parties avoid"). Far from allowing "the entire controversy to be resolved by the arbitral process" (Resp. Br. 24), the Third Circuit's rule

would effectively make an arbitrator's (invited) ruling on jurisdiction futile and a nullity.[6]

Respondents suggest that this Court should not concern itself with inefficiencies generated by the decision below, purporting to find an analogy in the usual federal rule that jurisdictional decisions by district courts are reviewed *de novo* after final judgment. Resp. Br. 19, 24 n.19, 27. This comparison is inapt, for it takes no account of the special arbitration context. The Arbitration Act sets out *sui generis* standards and procedures intended to make arbitration rapid, inexpensive, and substantially final, and so to encourage the diversion of disputes to the arbitral arena. Allowing a litigant to present arbitrability to the arbitrator for decision and, upon losing, to present arbitrability to the district court *de novo* would seriously undermine those statutory goals, which have no parallel in the relationship of the federal district courts and courts of appeals.

The purposes Congress intended the Arbitration Act to serve, as well as the language and structure of the Act, show that the parties' decision to submit the jurisdictional issue to the arbitrator should be given effect. The Third Circuit therefore erred when it held that the arbitrators' jurisdictional decision is to be reviewed *de novo*, rather than for manifest disregard of law.

---

[6] Because parties will often submit arbitrability to the arbitrator in lieu of seeking a judicial ruling in the first instance, it is not true that "the federal courts [would] become involved [through section 3 or 4 or stay proceedings] every time a jurisdictional objection were raised." Resp. Br. 26. In addition, as respondents admit, a "deferential standard [of judicial review of jurisdictional questions submitted to the arbitrator] would discourage some objecting parties from pursuing the jurisdictional issue in the courts" in section 10 proceedings. *Id.* at 25 n.20.

II. UNDER ANY STANDARD OF REVIEW, THE ARBITRATORS' JURISDICTIONAL RULING SHOULD BE AFFIRMED

The district court, while it ruled that "manifest disregard of law" is the correct standard of review, also applied the *de novo* standard in the alternative. After carefully considering the arbitration record, the district court "conclude[d] that even under a *de novo* review, the panel properly exercised jurisdiction" over the Kaplans. Pet. App. C18. Respondents have supplied no persuasive reason to upset that determination, still less to doubt that the arbitrators' jurisdictional decision failed the manifest disregard standard.

Respondents claim that the award against them should not stand because they "never signed any document containing an arbitration agreement." Resp. Br. 30; see also CK Br. 8-12. The district court, however, held that the Kaplans were bound by the arbitration clause in the Subordinated Loan Agreement because they had signed the Letter Agreement and because "[t]he Letter Agreement and the Subordinated Loan Agreement were executed in tandem, are inextricably intertwined and mutually dependent and must be read as a whole, particularly given the underlying circumstances and relationships of the parties" (Pet. App. C13)—circumstances that included Manuel Kaplan's frequent disregard of MKI's separate corporate existence. See *id.* at C28-C30.

Moreover, despite respondents' myopic focus on the alleged lack of an arbitration agreement, the district court held that Manuel Kaplan was bound by the arbitration result for two additional, compelling reasons. First, the court held that Mr. Kaplan's failure to separate his own affairs from those of MKI provided an independent ground for the exercise of arbitral jurisdiction. The court found that there was "ample support in the record for the arbitrators' decision to pierce the corporate veil" between Manuel Kaplan and MKI, and so to exert jurisdiction over Manuel Kaplan through their undisputed jurisdiction over the corporation.

Pet. App. C30. The evidentiary support for piercing the corporate veil included "considerable testimony regarding the commingling of Mr. Kaplan's personal funds with those of MKI" and evidence that Mr. Kaplan otherwise "disregarded corporate formalities and siphoned corporate funds." *Id.* at C28-C29. Those actions involved not only Mr. Kaplan's withdrawal of $611,000 from MKI in the weeks following the October 1987 crash,[7] but also a consistent pattern of commingling corporate and personal funds and treating MKI's assets as his own—including drawing MKI funds to use in buying a house and to pay his personal tax bills. Pet. App. C28-C29. There was evidence that between February 1986 and January 1989 "Manuel Kaplan removed from [MKI's] corporate account and used for personal purposes * * * a total of $4.5 million." *Id.* at C29.

The district court also held that the arbitrators had jurisdiction because the Kaplans *waived* their jurisdictional objections at a discovery conference and then waited two years to try to reassert those objections. The court held that this delay had been too long and that the objections had been lost as a result. Pet. App. C17 ("A party reasonably cannot 'reverse course' about an arbitration panel's jurisdiction once the arbitration has commenced and matters pertinent to the arbitration have been litigated and ruled upon"). This Court has made clear that in determining whether a "'defense to arbitrability'" has been waived or lost through delay—just as in "'constru[ing] the contract language itself'"—the Arbitration Act requires that "'any doubts concerning [arbitrability] should be resolved in favor of arbitration.'" *Mastrobuono* v.

---

[7] The bankruptcy court finding that respondents cite in connection with Mr. Kaplan's withdrawal of $611,000 from MKI is being contested in the district court. Resp. Br. 3 n.4. In the arbitration there was evidence that Kaplan used those funds to pay personal debts and none that he used them to pay MKI creditors. See C.A. App. A1049-A1051, A1234, A1240-A1242.

Shearson Lehman Hutton, Inc., No. 94-18, slip op. at 10 n.8 (March 6, 1995) (quoting *Moses H. Cone*, 460 U.S. at 24-25). Thus, even if respondents were correct in their assertion that the arbitration agreement did not apply to the Kaplans individually (which they are not), jurisdiction was properly exercised over both Manuel and Carol Kaplan on this waiver ground as well.[8]

III. THE THIRD CIRCUIT EXERCISED DE NOVO APPELLATE REVIEW IN CONFLICT WITH THE PRO-ARBITRATION POLICY OF THE ACT

The federal policy of promoting arbitration of private disputes is firmly embedded in the Arbitration Act, including section 16, which links the appealability of district court orders to the outcome of the district court decision as to arbitrability. See Pet. Br. 34-36. The explicit distinction drawn in section 16 is much too substantive to be, as respondents contend (Resp. Br. 36), a matter of mere

---

[8] The district court determined that, under any standard of review, Carol Kaplan was subject to arbitral jurisdiction on two distinct grounds. First, she had signed the Letter Agreement, obligating her to remit the Kaplans' tax refund check to First Options and, under all the circumstances of the case, had agreed to abide by the arbitration clause in the Subordinated Loan Agreement, which specifically provided for the arbitration of "any controversy arising out of or relating to * * * the Letter Agreement." J.A. 34. Second, she had waived her jurisdictional objections to arbitration at the discovery conference and left it too late to try to revive those objections. Respondents suggest that because the arbitration panel said its denial of respondents' motion to dismiss was rendered "after full consideration," it ruled solely on the merits and did not rest its jurisdiction on waiver. Resp. Br. 8 n.8; CK Br. 10 n.7. Respondents argued to the arbitration panel, however, that they had not waived objections to arbitral jurisdiction. C.A. App. A202, A204. "Full consideration" by the panel therefore obviously included consideration of the waiver ground for jurisdiction.

"timing." Moreover, promotion of arbitration over litigation is the repeated theme running through the legislative history of the Act and its amendments, and is stressed again and again in this Court's precedents.

In light of this policy, it would be odd indeed if a standard of appellate review were adopted that encouraged resort to the courts whenever a party was unhappy with the determination of a jurisdictional issue submitted to the arbitrator. Yet, that is the predictable effect of the *de novo* appellate standard urged by respondents. It would give the party disputing jurisdiction a chance to have the arbitrator rule in its favor, then to get a fresh attempt in the district court, and then to procure yet another opportunity in the court of appeals—encouraging disrespect for arbitral finality and undermining the speed, efficiency, and cost advantages of arbitration.[9]

Respondents contend that *de novo* review would promote "predictability and consistency of outcome." Resp. Br. 36. But "doctrinal uniformity" (*id.* at 33) has never been an objective of the arbitration process: "arbitration seeks particularized justice rather than to foster substantive consistency and predictable results for the future." 1 I. Macneil, R. Speidel, & T. Stipanowich, *Federal Arbitration Law* at 2:40; see also Pet. Br. 24-25. Respondents' desire for uniformity is not achievable in a forum in which written opinions are

[9] Respondents' contention that *de novo* review would be as speedy as more deferential review (Resp. Br. 35) is wrong and misses the point. It is wrong because a court of appeals applying *de novo* review would be unable to stand on the shoulders of the district court and rely on its work, but, like the court of appeals here, would have to comb through the entire record anew. More important, *de novo* review would provide the losing party in district court a greater incentive to appeal than would a deferential standard, encouraging appeals and delaying final resolution of the dispute.

rarely issued and even more rarely published. Respondents, having submitted their dispute to the arbitrators and lost, now seek the full panoply of appellate protections. But to grant their wish would defeat the very rationale for arbitration as an efficient substitute for litigation.

A. The Eleventh Circuit's hybrid standard of review conforms to the pro-arbitration policy of the Act. The Eleventh Circuit's hybrid standard of review for determinations of arbitrability appropriately implements federal policy. It takes a hard look at rejections of arbitrability and a light look at confirmations of arbitrability. This standard tracks the differential treatment accorded confirmation and vacation of arbitrability determinations in section 16 of the Arbitration Act. It thus renders the role of the appellate court compatible with the pro-arbitrability policy directed by Congress.

Respondents find it unseemly to have standards of review reflect "substantive policies." Resp. Br. 33. They argue that a "'bifurcated' standar[d] depending on the outcome below" is found in "no other area of law." *Id.* at 34. In fact, such bifurcation is found in numerous areas of law. For example, courts of appeals give greater deference to district courts' denials of new trial motions after jury trials than to grants of such motions. *E.g.*, *Koonce* v. *Quaker Safety Prods. & Mfg. Co.*, 798 F.2d 700, 718 (5th Cir. 1986); see also 1 S. Childress & M. Davis, *Federal Standards of Review* 5-82 (2d ed. 1992). Appellate courts review denials of leave to amend pleadings more strictly than grants. *E.g.*, *Mayes* v. *Leipziger*, 729 F.2d 605, 608 (9th Cir. 1984). Hybrid standards are also often applied to discovery decisions and involuntary dismissals. 1 *Federal Standards of Review*, *supra*, at 4-154. These hybrid standards reflect substantive policies against overriding juries and involuntary dismissal and in favor of liberal amendment of pleadings and liberal discovery. Similarly, the Eleventh Circuit's hybrid standard of review accommodates the substantive federal policy in favor of arbitration of private disputes.

Respondents also complain that in other areas of law courts of appeals do not defer to district courts' review of "another entity's" decision. Resp. Br. 34-35. However, the "entities" respondents point to are all courts or government agencies, not, like arbitrators, third parties hired by the parties and by whose rulings the parties are contractually bound. This private contractual context, and Congress' decision in the Arbitration Act to protect and promote arbitration agreements and to minimize judicial intervention, readily distinguish this case from the situations respondents identify.[10]

B. If the court of appeals had applied ordinary standards of review, it would have affirmed the district court. If the standard of appellate review ordinarily applicable to factual findings were to be applied it would still require confirmation of the arbitrator's award. Though the court of appeals paid lip-service to the clearly-erroneous standard for review of factual findings (Pet. App. A15), it then engaged in a lengthy review of the evidence that gave absolutely no

[10] Respondents claim that a bifurcated appellate standard would breed "confusion" whenever the district court partially vacated or modified an arbitration award. Resp. Br. 36 n.32. But courts of appeals have long experience handling differing standards for reviewing factual and legal determinations in the same case. See also, *e.g.*, *United States* v. *Guardino*, 972 F.2d 682, 686 (6th Cir. 1992) (restitution order under Victim and Witness Protection Act is subject to "bifurcated" standard of review—*de novo* for legality of order and abuse of discretion for amount ordered); *Massachusetts* v. *United States*, 788 F. Supp. 1267, 1270 (D. Mass. 1992) (describing First Circuit's "bifurcated standard of review in food stamp cases, applying a *de novo* standard to the determination of the violation and a limited administrative review standard to the sanction imposed").

deference to the district court's critical factual determinations.[11]

Respondents suggest (Resp. Br. 37) that there were no relevant factual disputes in this case because the parties filed factual stipulations—an extraordinary contention given the extent to which respondents argue facts in their brief. To be sure, some facts were stipulated by the parties—most notably respondents' waiver of jurisdictional objections at the discovery conference. J.A. 55. But that stipulation left an open question about respondents' intentions in making the waiver. And none of the stipulations concerned other facts upon which the district court's decision explicitly rested. For example, the parties' stipulations did not address "the underlying circumstances and relationships of the parties," which informed the district court's interpretation of the parties' intentions in entering into the Workout Agreement. Pet. App. C13. Nor did the stipulations cover the factual basis for the court's conclusion that arbitral jurisdiction was proper on a piercing-the-corporate-veil theory. That ruling was based upon evidence in the arbitration record that Manuel Kaplan commingled his funds with MKI's, ignored MKI's corporate form, and used MKI's assets as his own. *Id.* at C28-29. Because the district court's review of arbitral jurisdiction was therefore largely fact-bound, the court's ruling was entitled to substantial deference.

[11] Respondents' contention that the court of appeals' misapplication of ordinary standards of review "should not be considered" by this Court lacks merit. Resp. Br. 37. The second question on which certiorari was granted explicitly raises the application of the *de novo* and abuse of discretion standards. Also, the appropriate application of ordinary standards of review is before this Court because the issue is "fairly subsumed" in the granted questions and has been briefed by both parties. *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 512 (1991).

Even in its review of conclusions of law, the court of appeals erred. Independent review by a court of appeals means that it should stand in the shoes of the district court, applying the same "manifest disregard" standard that governs the district court's review of the arbitrators' award. See Pet. Br. 38-39. Only in that way does a court of appeals accord due respect to "the only decision-maker arguably entitled to deference—the arbitrator." *Mastrobuono*, slip op. at 8 n.4. Instead, the Third Circuit rejected the manifest disregard standard and reviewed *de novo* all the bases of both the arbitrators' and the district court's decisions, repeating the work already done by two other tribunals. This replication of effort destroyed the benefits of arbitration, causing greater burdens than would have been associated with litigation, and cannot conceivably be the correct approach.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

STEPHEN P. BEDELL
TIMOTHY G. MCDERMOTT
Gardner, Carton & Douglas
321 North Clark Street
Chicago, Illinois 60610

KENNETH E. WILE
Bank of America National
Trust & Savings Association
231 South LaSalle Street
Chicago, Illinois 60697

JAMES D. HOLZHAUER
Counsel of Record
TIMOTHY S. BISHOP
JEFFREY W. SARLES
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

MARCH 1995